

D8D7SECC

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 SECURITIES AND EXCHANGE COMMISSION,

5 Plaintiff,

6 v.

13 Civ. 2575 (GBD)

7 GIBRALTAR GLOBAL SECURITIES, INC.
8 and WARREN A. DAVIS,

9 Defendants.
10 -----x

11 August 13, 2013
12 12:00 p.m.

13 Before:

14 HON. GEORGE B. DANIELS

15 District Judge

16 APPEARANCES

17 JAMES KIDNEY
18 Attorney for Plaintiff

19 DEFEIS O'CONNELL & ROSE, P.C.
20 Attorneys for Defendants
21 BY: NICHOLAS DEFEIS
22 PHILIP PATTERSON
23
24
25

D8D7SECC

(Case called)

(In open court)

MR. KIDNEY: Good morning. James Kidney for the plaintiff Securities and Exchange Commission.

THE COURT: Good morning.

MR. DEFEIS: Good morning, your Honor. Nicholas DeFeis and Philip Patterson for the defendants Warren Davis and Gibraltar Securities.

THE COURT: Good morning. Let me hear defense on their motion. Is that you, Mr. DeFeis?

MR. DEFEIS: That would be me. Thank you. I guess there are essentially two claims made by the SEC, both of which we argue are deficiently pled: One is that these defendants solicited U.S. customers without being licensed, essentially to operate it as a broker dealer in the United States.

And we contend principally -- and I should say as a preliminary matter, that website is currently down. It hasn't been in operation. Gibraltar is in the process of winding down itself. I should further indicate that we are aware of no cases that have been brought or sustained relying solely on the presence of a website as a solicitation in any way, and we think that the website did nothing to solicit within the terms of the statute itself, and even within the terms of the interpreted guidance given about it. There were no phone calls made to people in the United States, no mailings, no spam, no

D8D7SECC

1 advertising whatsoever, no presence whatsoever within the
2 United States. And as the SEC itself points out in its
3 interpreted release -- which we cite at page 12 of our opening
4 brief -- "The Commission does not believe as a policy matter
5 that registration is necessary if U.S. investors have sought
6 out foreign broker dealers outside the United States and
7 initiated transactions in foreign securities markets entirely
8 of their own accord." That is precisely what this case is
9 about.

10 The case has been under investigation for years.
11 There is a parallel action pending before your Honor, as you
12 know, involving some additional defendants, but also involving
13 other investors of a substantial amount. There was an
14 investigation and a settlement in Florida involving still
15 additional investors. The SEC obtained records as part of its
16 investigation through the Bahamian Security Commission -- with
17 the cooperation, by the way, of my client and his company -- of
18 19 investors that are listed in the subpoena, and they have yet
19 to point to someone who was actually solicited.

20 All of the transactions involved in this case -- and
21 even common sense tells us could take place -- were initiated
22 by the customers. These customers went to Gibraltar for their
23 own reasons, and common sense tells us that you don't just surf
24 the Web thinking about what potential brokerage opportunities
25 there are for you. None of these customers involved or

D8D7SECC

1 investors involved in the various SEC complaints -- and, by the
2 way, in the companion action just about all those investors are
3 Canadian, and I think the SEC itself agrees that 80 percent of
4 the traffic based on its website statistics were from Canada.

5 THE COURT: Well, I don't think I had an opportunity
6 to see the websites. Is there attached a copy of any of the
7 information attached to any of the affidavits?

8 MR. KIDNEY: No, it's described in our brief fully in
9 the complaint.

10 MR. DEFEIS: Well, it's selectively described. It's
11 eight pages long -- when it existed. It no longer exists. And
12 the SEC, pardon me, relies on in my view the essentially junk
13 science to establish that customers were solicited by this
14 website. They haven't pointed to any of their customers
15 involved in these complaints or these investigations actually
16 were solicited or drawn to the website as a result of what is
17 there, and they certainly have this within their power. Common
18 sense tells us that that's not the way anyone would decide to
19 open a brokerage account. Then they use this web analyzer tool
20 which every day -- and they cite this in the complaint. You
21 know, we get the complaint, we look at the web analyzer, and we
22 see that every day of the week, whenever you try it, including
23 the day that we filed the reply brief, says that there are
24 2,200 some odd people came in to view the site. It's
25 meaningless, but they decided to cite it. But it proves

D8D7SECC

1 absolutely nothing.

2 Then they rely on language in the complaint to
3 essentially -- I don't know how they think that the court is
4 going to ignore the fact that, yeah, the website is in
5 English -- of course the national language of the Bahamas is
6 English. Everybody speaks English there -- the currency is in
7 U.S. dollars. And of course the Bahamian currency is tied to
8 the U.S. dollar on a one-to-one basis. I mean there is really
9 no reason to make the jump between this website and the
10 solicitation of any U.S. customers whatsoever.

11 THE COURT: Would it be incorrect or inaccurate to
12 characterize the website as an advertisement or including an
13 advertisement?

14 MR. DEFEIS: I don't know. Obviously, the website is
15 promotional in some way. Our law firm, every law firm in the
16 city that I know of has a website. I think we are required to
17 have some sort of legend that may say this is advertising. But
18 is it the solicitation of customers anywhere?

19 The SEC itself has indicated in its interpretive
20 guides that the mere presence of a website is not enough to
21 make out a solicitation of U.S. customers. And they have
22 adequate opportunity during this investigation to point to U.S.
23 customers who were actually solicited as a result of the
24 website, and they just don't exist.

25 So, they ask the court to draw the inference that some

D8D7SECC

1 U.S. customers must have come to the website as a result of its
2 just barely being there, but I think common sense tells us it's
3 not the case.

4 THE COURT: Well, the difficulty that I have initially
5 is answering I guess two questions. Who are you soliciting
6 through the website? And how does it exclude rather than
7 include U.S. investors?

8 MR. DEFEIS: I don't think it's required to exclude
9 U.S. investors. The key is whether U.S. investors initiated
10 the content. That's what it says in the interpretive release
11 which we cite. They give some examples --

12 THE COURT: Well, U.S. investors don't initiate the
13 contact if they do so in response to an advertisement or
14 solicitation.

15 MR. DEFEIS: That's right.

16 THE COURT: So, the first question that I have is, all
17 right, I have a website -- and I assume that it's not critical
18 to your argument that I make some determination that the
19 website does not constitute a solicitation.

20 MR. DEFEIS: No, it's not critical. You could still
21 determine that it is a solicitation or an advertisement of some
22 kind, but you still have to determine was it targeted to U.S.
23 customers in any way.

24 THE COURT: That's what I'm asking.

25 MR. DEFEIS: Yes.

D8D7SECC

1 THE COURT: Well, who is it targeted to?

2 MR. DEFEIS: The investing community, and
3 already-existing customers who might have heard about Gibraltar
4 in some way.

5 THE COURT: Well, it can't be existing customers who
6 heard about Gibraltar. If they are already existing
7 customers --

8 MR. DEFEIS: All right. In the same way somebody
9 checking out a law firm or an accounting firm would say, oh,
10 let me just see what's on their website.

11 THE COURT: So, give me an example of who is being
12 solicited.

13 MR. DEFEIS: I'm not -- I think it's national. So I
14 guess I hesitate -- I don't think we have to determine -- it's
15 not critical to our argument that the court find that it
16 doesn't solicit at all.

17 THE COURT: Well, it has to be critical unless you can
18 answer that question. Because if it's a solicitation, then you
19 are soliciting customers, and so the natural question is which
20 customers are you soliciting.

21 Now, if you say you are only soliciting Chinese
22 customers, then I can understand it. If they want to argue
23 that you are only soliciting U.S. customers, that's kind of
24 difficult to argue since I don't hear anything that directly
25 says this is supposed to be only to U.S. customers. But if you

D8D7SECC

1 say it's a general solicitation, then it obviously begs the
2 question. If you say that general solicitation includes
3 Canadians, then in what way at this stage of the proceeding am
4 I supposed to say the general solicitation doesn't include
5 Americans, U.S. citizens?

6 MR. DEFEIS: I think because you have to look at the
7 interpretive -- you have to look at the interpretive guidance,
8 which basically says the mere presence of a website does not
9 constitute solicitation of U.S. customers. And you do not have
10 to have these legends or warnings excluding U.S. customers to
11 stay away.

12 I mean if the case goes forward, you know, we go to
13 the next step and look at what kind of compliance procedures
14 there are in effect, and what a potential customer would have
15 to provide in order to be able to open an account at Gibraltar.
16 But again, this defunct website was not targeted to U.S.
17 customers, it was informational.

18 THE COURT: Well, again, that's why it can't be
19 just -- if it's just informational and that's the determinative
20 factor, then it's not a solicitation. If it's a solicitation,
21 if one of the purposes or the primary purpose is to attain new
22 customers, if they get the benefit of that argument at this
23 stage of the proceedings --

24 MR. DEFEIS: Right.

25 THE COURT: -- then the question is: Is there any way

D8D7SECC

1 that you can look at this website and determine that it is
2 targeting a particular customer? Or is there any way that you
3 can look at this website and say that it's targeting customers
4 other than United States investors?

5 MR. DEFEIS: It does not distinguish among potential
6 customers, but it's not required to. The key is who initiated
7 the contact with the website. If it's just a potential
8 customer -- and I don't know how the person would go to the
9 website. Let's just think about this. OK?

10 We have a potential customer who received no spam, no
11 mailings, no cold calls, no advertisements in the U.S. at all,
12 no physical presence in the U.S. at all. How would this
13 potential customer come to the site? If he is going there with
14 the intent to engage in a transaction and obtains some
15 reassurance that this company is capable of handling the
16 transaction, and has certain features about the way it handles
17 accounts, then that is not something that is a solicitation
18 that is covered by the U.S. securities laws.

19 THE COURT: Well, you are characterizing it
20 differently. If you are going to characterize it that way,
21 that characterizes the -- you are making the determinative
22 factor how the contact is initiated with the website, but
23 that's not the critical question. The question is how does the
24 American investor, the U.S. investor, become a customer. So,
25 the solicitation isn't did I talk them into coming to my

D8D7SECC

1 website; the solicitation is did my website talk them into
2 investing with my company.

3 MR. DEFEIS: I actually think the former question is
4 important, which is basically who initiated the contact with
5 the website. Was this a U.S. customer that was looking for
6 whatever reason to engage in a transaction, open an account
7 with a foreign broker dealer?

8 Again, we cite this in somewhat greater length on page
9 12 of our opening brief, "In the event that U.S. investors
10 would have taken the initiative to trade outside the United
11 States with foreign broker dealers, they are not conducting
12 activities within this country. Consequently, the U.S.
13 investors would have little reason to expect these foreign
14 broker dealers to be subject to U.S. broker dealer
15 requirements. Requiring a foreign broker dealer to register as
16 a broker dealer with the Commission because of unsolicited
17 trades with U.S. persons could cause that foreign broker dealer
18 to refuse to deal with U.S. persons under any circumstances."

19 THE COURT: I know, but that's what I say, you're
20 right, the critical point seems to me -- unless you can
21 convince me I should refocus -- it's whether the trades are
22 solicited or unsolicited: It's not whether the contact is.

23 If I go on the website in this day and age and I say
24 that I am looking for a licensed contractor, and I need
25 somebody to fix the sink --

D8D7SECC

1 MR. DEFEIS: Right.

2 THE COURT: -- and I get on the website and put in
3 "broken sink" and it comes up with all of these people who can
4 fix sinks --

5 MR. DEFEIS: Right.

6 THE COURT: -- and if I see a website, and this person
7 says we fix sinks the cheapest of anybody else, you ought to
8 come to us, and you ought to hire us to fix your sink --

9 MR. DEFEIS: Um-hum.

10 THE COURT: -- now, if they're not licensed, and their
11 website is geared to convincing me to choose them over someone
12 else, then once I make a decision based on what I see on their
13 website, that that website convinces me to hire them, in what
14 way is that not a solicitation?

15 MR. DEFEIS: That would be a solicitation.

16 THE COURT: OK. How is that different than if I
17 searched for broker dealers, I come up with a list, I see
18 Gibraltar on that list, Gibraltar says, yeah, we can invest in
19 whatever you want to invest in, you know, we'll take it in U.S.
20 dollars, and clearly in English and says, you know, no question
21 that we're the greatest broker dealer in the world, come and
22 invest with us. And if I look at the website and based on that
23 I call you up and send you my money, why is that not a
24 solicitation?

25 MR. DEFEIS: Because it would cover a universe of

D8D7SECC

1 broker dealers operating all around the world that have decided
2 for whatever reason not to register in the United States. I
3 mean the problem is it proves too much.

4 THE COURT: Well, no, the question is how did I get
5 the customer. That's the only question. The question is did I
6 get this customer -- solicitation to me means did I get this
7 customer because I decided to let the customer know that I was
8 available to do this type of business, and then I convinced the
9 customer to invest with me.

10 MR. DEFEIS: Right.

11 THE COURT: Now, if that is the general scenario that
12 the SEC is alleging at this point, why wouldn't that in the
13 abstract fall within, yes, that's what you cannot do. You
14 cannot put on your website something that convinces them to
15 contact you because they think that you're eligible to do the
16 investment. And the purpose of the website is to convince them
17 to invest their money with you, and so, therefore, when they
18 contact you you follow up and you convince them to go ahead
19 and --

20 You are saying it's not a solicitation if they go to
21 your website first.

22 MR. DEFEIS: It's not a solicitation if their
23 intent -- right, if they go to the website first.

24 THE COURT: But suppose I just search it? That's what
25 web searches are.

D8D7SECC

1 MR. DEFEIS: But again it proves -- the SEC intended
2 to provide some sort of safe harbor, international exchanges,
3 trading, the world is becoming smaller place and so forth, for
4 international broker dealers -- not to block out U.S. customers
5 from actually going to the website.

6 THE COURT: Isn't the purpose of the website -- or at
7 least their arguable purpose of the website -- is to basically
8 say to the customers come and invest with me?

9 MR. DEFEIS: I think --

10 THE COURT: Isn't that the definition of a
11 solicitation?

12 MR. DEFEIS: In a very broad sense, in the same way
13 that any legal website is saying, you know, come hire me as
14 your lawyer. But I think, with all respect, it's sort of a
15 simple way, too simple a way to look at it. I think the more
16 complex way to look at it, and the probably the more
17 appropriate way to look at it, is why these customers were
18 there in the first place.

19 THE COURT: They were there because you told them
20 that -- well, they were there because they were searching not
21 for you, they were searching for someplace to invest.

22 MR. DEFEIS: Right.

23 THE COURT: And they happened to run into you, and you
24 told them that, yes, invest with me because I can do this for
25 you. Why isn't that the scenario?

D8D7SECC

1 MR. DEFEIS: Well, again, because then we assume that
2 every website would be subject to the same -- every foreign
3 broker dealer that has not blocked U.S. accounts or U.S.
4 citizens from accessing their website would run the same risks.

5 THE COURT: Well, no, not necessarily, because you
6 have certain websites that make it clear that they're not
7 soliciting U.S. investors. That's not your case.

8 MR. DEFEIS: Right.

9 THE COURT: Two, you have certain websites that would
10 indicate that they're looking for certain types of non-U.S.
11 investors, or -- what was my other example -- that the
12 information is somehow inconsistent with an argument that you
13 are targeting U.S. investors.

14 Obviously, if you said invest with us, we do all our
15 investments in French francs, and you were in French, obviously
16 the argument could easily been made that you could not have
17 been targeting U.S. citizens. And obviously in the most
18 extreme example, if it was a website in French, saying you
19 invest in francs, saying you invest in euros in Europe, and
20 saying, by the way, we don't invest in U.S. dollars, you'd have
21 a real easy case that that's not a solicitation.

22 But how do I get from one extreme on that side to the
23 other extreme that when I'm saying come invest with me, I will
24 invest in U.S. dollars, I'm giving this in English, I'm not
25 excluding U.S. investors, and their argument is, look, you

D8D7SECC

1 know, it doesn't take a rocket scientist to understand that
2 when you do that it's going to make certain U.S. investors
3 decide based on your communication that they should invest with
4 you. And they might not have done that unless you had put out
5 a communication, just as if you had sent out a mass mailing.
6 You wouldn't argue if you sent out a mass mailing and that
7 mailing went to both Canada and the U.S. that that mailing
8 wasn't targeted to U.S. citizens.

9 So, the question is where do I draw the line? Do I
10 draw the line at -- and I haven't seen any case law either way
11 that either one of you have cited that say I should draw the
12 line there -- you want me to interpret the SEC guidelines --
13 but where do I draw the line with regard to websites that are
14 clearly communicating they are not limiting the universe of
15 people that they're communicating with.

16 So, clearly there is nothing about this website that
17 would give anyone the impression that whatever you are trying
18 to communicate, that you're not including U.S. citizens within
19 whatever you are trying to communicate. So, if you are trying
20 to solicit, isn't there an argument to be made, well, look,
21 based on the communication itself, what's the argument to be
22 made that you are soliciting Canadians rather than U.S.
23 citizens from the website itself?

24 MR. DEFEIS: You could make the argument that you are
25 soliciting people of any English-speaking country, I suppose,

D8D7SECC

1 but --

2 THE COURT: But that includes U.S. citizens.

3 MR. DEFEIS: -- but that proves too much. That proves
4 too much. And I think you do need something. Yes, I mean you
5 could have the extreme example where it's a website in French,
6 and they only deal in I guess it's euros or whatever. I
7 remember French francs myself. But in any event, yeah, you
8 could make the argument that you could have a stronger case
9 where there were, you know, no intent to solicit in the United
10 States whatsoever just by looking at the face of the website.

11 But our point is you don't have to have that extreme.
12 You don't have to deliberately block U.S. people. You don't
13 need to have Surgeon General warnings. All you need to look at
14 is who initiated these transactions and whether that was
15 actually an intent that involved solicitation -- as opposed to
16 U.S. investors just coming to the site for their own reasons.
17 who want to invest, who want to have a foreign brokerage
18 account, which is what the SEC says that they can do.

19 THE COURT: But that's a little different than I
20 understood the papers as saying, because I thought you were at
21 least conceding the argument that regardless of how they got to
22 the website, if they had an investor who said I went to the
23 website and the website said they could do all of these
24 services, and I invested because of the website, I thought your
25 argument -- at least part of your concession -- was if they at

D8D7SECC

1 least had someone who said they invested because they went to
2 the website, some U.S. investor, that that would be sufficient.
3 That was not your argument?

4 MR. DEFEIS: That would at least accomplish at least
5 something of the link that the SEC's complaint lacks.

6 THE COURT: Well, would that be a sufficient link or
7 an insufficient link?

8 MR. DEFEIS: Well, I guess if it's one isolated
9 investor, I guess conceivably -- you know, we might be before
10 you arguing, maybe it's on a motion for summary judgment stage,
11 that this is really insignificant.

12 THE COURT: So, suppose there were five investors.
13 Suppose they said, for example, these five people said they are
14 U.S. investors, they went to the website, and because of the
15 information and what they characterize as a solicitation on the
16 website that's the reason that they decided to invest.

17 MR. DEFEIS: Right. Then we would have a factual
18 issue. We would have to depose these investors. You know, we
19 would have something -- we might have a complaint that survives
20 the motion to dismiss.

21 THE COURT: Well, that's the question.

22 MR. DEFEIS: But they don't have that here. They
23 don't have the link. I mean they have tons of investors, they
24 have a significant amount of money, a lot of trading that takes
25 place, but they don't have anyone -- despite an investigation

D8D7SECC

1 that's at least three years old -- that can say that I was
2 solicited by this particular brokerage firm.

3 And, even in this complaint they yoked on transactions
4 with MDOR -- I forgot what the acronym stock symbol stands
5 for -- involving it was a case down in Florida, they had three
6 or four people who were charged, many of whom settled, they
7 were U.S. investors, but they don't even contend that these
8 people were solicited to the website. It's basically two
9 unrelated --

10 THE COURT: But solicited by the website.

11 MR. DEFEIS: Either one. They don't contend that.
12 It's unrelated. And they try to paint over this by what I
13 characterized as the junk science, which is basically a
14 website. They know they need that link, by the way, which is
15 why they plead it. That's why it's there. But their website
16 analyzer comes up with the same result day after day.

17 And, you know, again, they have selectively quoted
18 information from the website to argue, including information
19 that -- again, I think it's, you know, ridiculous to say that
20 they shouldn't be able to provide quotes in U.S. dollars, since
21 their currency is tied to the dollar, and English is the native
22 language down there. Again, we are talking about a website
23 that is no longer operational; it hasn't been since before the
24 SEC filed the complaint.

25 THE COURT: Well, the tougher part is that there is

D8D7SECC

1 nothing about the website that I am aware -- and again I
2 haven't seen the website but I have heard it described -- there
3 is nothing about the website that would indicate that the
4 website is not a communication -- at least I will use that
5 word -- not a communication to U.S. investors.

6 MR. DEFEIS: Well, I guess I would say not a
7 communication to the world, including U.S. investors.

8 THE COURT: Well, but if it includes -- I mean, let's
9 put it this way, it would be difficult to argue, and may even
10 be not a genuine reasonable argument to say that this website,
11 that whatever reaction was expected of investors by what was on
12 this website, that it was intended to affect Canadians the same
13 way it affects U.S. citizens and vice versa.

14 MR. DEFEIS: I agree a hundred percent, I did not
15 distinguish among viewers of the website.

16 THE COURT: Right. So, whatever you are trying to
17 communicate, you clearly can't argue that the website only
18 intended to solicit Canadians.

19 MR. DEFEIS: Correct.

20 THE COURT: You can't make that converse offer.

21 MR. DEFEIS: You can't argue the website was intended
22 to solicit any particular group or to deny access to any
23 particular group.

24 THE COURT: OK. And again I want to concentrate,
25 because I will see how they characterize it, but I think that

D8D7SECC

1 it's critical -- it may be critical to my decision as to
2 whether or not the issue is whether they were solicited to the
3 website or solicited by the website. What do you say the issue
4 is?

5 MR. DEFEIS: I think that they have to be solicited --
6 I think it's actually both, but I would say solicited to the
7 website is a critical issue.

8 THE COURT: Well, but if I'm solicited to the website,
9 and I go decide -- if nothing on the website is a solicitation
10 for me to invest, what difference does it make whether I was
11 solicited to the website?

12 If I did a general search, and the website was one of
13 ten websites that I came up with, and I went to Gibraltar's
14 website, and Gibraltar says, please, U.S. investors, invest
15 with us, it wouldn't matter why I got to the website.

16 MR. DEFEIS: Because I think that the latter involves
17 too much of a subjective determination frankly for broker
18 dealers to have to contend with. I think it's beyond what the
19 SEC intended, and I think when we have to try to figure out why
20 this person decided to invest, we're getting into territory
21 that would be very difficult to deal with.

22 THE COURT: Well, but I'm not sure I can agree with
23 that, because if once you get to the website the website had
24 what is a clear advertisement and solicitation to convince U.S.
25 investors to invest money, I think it would be irrelevant how

D8D7SECC

1 you got to the website if it was the website that was used to
2 convince you to invest, if the nature of the substance of what
3 was on the website --

4 MR. DEFEIS: Well, then it's hard to argue that you
5 didn't satisfy the former, I suppose, that that wasn't your
6 intent in having the website, which was to solicit U.S.
7 investors. In fact, if they get to the website and say, hey,
8 U.S. investors, we're closed for the Fourth of July, whatever,
9 then it's hard to argue that wasn't the intent.

10 But I think that the intent of the I guess I will call
11 it the safe harbor provision is to say you still can have a
12 website, and so long as you didn't intend to initiate or
13 solicit, have customers come to open up accounts as a result of
14 a solicitation of the website, that you are OK to operate in
15 this international environment.

16 I think that what we are missing here is we're missing
17 all the other indicia that may exist of solicitation of U.S.
18 customers, including, as a factual matter, people who were
19 solicited in these three cases, which we don't have. And, you
20 know, again, no advertising, no spam or junk mail, no U.S.
21 presence, no cold calling.

22 THE COURT: All right. I mean -- OK, I think I
23 understand.

24 MR. DEFEIS: What are they supposed to know about --
25 they're not licensed obviously by definition to operate here.

D8D7SECC

1 What are they supposed to know about what they should put on
2 the website?

3 THE COURT: I think I understand your argument. They
4 have to avoid two things: They have to avoid soliciting U.S.
5 customers to the website, and they have to avoid once they get
6 to the website convincing them to invest.

7 So, I understand your argument then if they have done
8 nothing to get U.S. investors to come to the website, and
9 they've done nothing specifically on the website that targets
10 the U.S. investor so that it tries to convince them once they
11 get there to invest, then you're saying the government needs
12 something else to define a solicitation.

13 MR. DEFEIS: Right.

14 THE COURT: Because, as I said, I guess they don't do
15 that anymore. I don't know if you had this experience, but
16 I've had friends probably decades ago that would be like Amway
17 representatives, and they would say come to my house, and they
18 wouldn't tell me why. And they'd say, well, we got this thing,
19 we're going to have a get-together, and then I show up, and
20 then they have this whole Amway presentation about how I should
21 buy Amway products. And I say to myself, well, golly, you
22 convinced me to come to your house under false pretenses, and
23 now when I get here, I'm sitting here with everybody trying to
24 convince me with everybody else to buy a product. I don't want
25 to disparage Amway, but I'm just saying that that's the way in

D8D7SECC

1 those days I reacted to it when some people approached me.

2 But in this case your position is that they don't
3 allege that any of the U.S. customers were directed to the
4 website by the company, and they don't allege that anything on
5 the website specifically attempts to convince U.S. customers to
6 invest with Gibraltar.

7 MR. DEFEIS: That is correct.

8 THE COURT: If U.S. customers did invest with
9 Gibraltar, then safe harbor applies, unless they can identify
10 or at least give an example of one of those U.S. investors not
11 doing so on their own, but having done so because they were
12 either solicited to the website or solicited by the website.

13 MR. DEFEIS: That's correct.

14 THE COURT: All right.

15 MR. DEFEIS: You know, moving on to -- we also argue
16 that they haven't -- you know, again with respect to the
17 operating as an unlicensed broker dealer, they allege control
18 person liability of Warren Davis.

19 THE COURT: Well, how is Warren Davis not a control
20 person? He is the sole investor, sole officer, sole owner of
21 the company. Who else?

22 MR. DEFEIS: He controlled Gibraltar, conceded, but
23 again we have not found a case imposing control person
24 liability where there is no fraud alleged. And the language
25 which we cite there is basically he has to be a culpable

D8D7SECC

1 participant. And we cite the authority for that.

2 So, it's not ownership; it's culpable participation.
3 And we're not aware of any case that holds -- all these control
4 person cases are Section 10 and Section 17 claims involving
5 fraud.

6 THE COURT: But why do you say the culpable
7 participation has to rise to the level of fraud? If I am the
8 control person in the broader sense, in the generic sense, and
9 I am responsible for the illegal acts that the company commits,
10 why are those illegal acts only limited to fraud? If I know
11 that the company is not supposed to solicit customers in the
12 U.S., and I deliberately make the company solicit customers in
13 the U.S. in violation of U.S. law, why do I escape control
14 person liability simply because in most cases -- if not all
15 examples that you have cited -- the cases are usually fraud
16 cases?

17 MR. DEFEIS: They all appear to be fraud cases, and
18 the language used is that you have to be a culpable
19 participant.

20 THE COURT: Well, what is culpable? Culpable means
21 that you are responsible for the illegal acts of the company.

22 MR. DEFEIS: Right.

23 THE COURT: You're not saying the definition of the
24 word culpable is fraud.

25 MR. DEFEIS: No, I'm saying -- no, they may not be

D8D7SECC

1 synonymous, but there is a certain level of intent involved and
2 a certain level of participation. This company had --

3 THE COURT: Well, if I intended to break U.S. laws,
4 why is that not culpable?

5 MR. DEFEIS: Well, yeah, if you were a one person
6 shop, maybe you would be, maybe you would be chargeable as a
7 principal. But we are talking about a brokerage firm that when
8 it was in operation employed ten people. So, again we have
9 what the SEC contends is a case where it's essentially strict
10 liability. So that's why the courts are, in my opinion --

11 THE COURT: Well, suppose I violated the tax laws?
12 Are you saying that I can't be a control person? I mean you
13 say it's limited to fraud.

14 MR. DEFEIS: I'm saying the cases that we have
15 found -- if the SEC has another case, they should call it to
16 our attention -- but the cases we have found impose control
17 person liability in cases where the allegations are fraud.
18 They're saying this is a strict liability offense.

19 THE COURT: Right. But you don't know of any case
20 that says that it is limited to fraud.

21 MR. DEFEIS: No. But this would be maybe the first
22 time a court, you know -- this will be the first time that
23 control person liability were imposed for Section 15(a)(1)
24 claims, so far as we know.

25 THE COURT: But it also would be the first time that

D8D7SECC

1 any court would say that unless you commit fraud you can't be a
2 control person.

3 MR. DEFEIS: Correct. But they've always used -- they
4 have used this language culpable participant.

5 THE COURT: Right, culpable --

6 MR. DEFEIS: But that's something beyond ownership.

7 THE COURT: Yeah, but if you want to give me a
8 definition of culpable that excludes this, I'm willing to hear
9 it, but the definition of culpable is not fraud; the definition
10 of culpable is something much broader that includes other
11 illegal acts that you are responsible for other than fraud.

12 MR. DEFEIS: Certainly the colloquial understanding
13 that we have of what a control person would be -- sorry -- of
14 what culpable would be would be beyond fraud, that they're
15 basically responsible somewhere.

16 But, again, given the breadth of the claims here, and
17 the fact that they don't have to show intent to deceive, we
18 could see why a court would be reluctant to reflexively impose
19 control person liability in instances where there was no intent
20 to defraud involved. OK?

21 THE COURT: Well, I'm not sure I would understand
22 that, because, as I say, if there was an intent to violate the
23 tax laws or intent to violate other laws of the U.S., I don't
24 know what would be the good public policy reason to say, well,
25 you get a pass on that because it wasn't fraud.

D8D7SECC

1 MR. DEFEIS: Well, I mean you still would punish the
2 company. The company would still be subject to -- so, maybe
3 there is no --

4 THE COURT: What's the rationale for punishing the
5 control person on fraud and not punishing the control person on
6 other violations of U.S. law?

7 MR. DEFEIS: Well, because in the fraud instances they
8 are, you know -- the culpable participant does include I think
9 a concept that there is some awareness of the situation and
10 ability to change.

11 THE COURT: Well, that's the concept here too.

12 MR. DEFEIS: OK. Well, you know, maybe we will be
13 making law in the case. I don't know. But the bottom line is
14 that we have not found authority for imposing control person
15 liability in claims of this kind. So, that's basically it.
16 You know, we could argue whether it's good public policy or bad
17 public policy, but we just don't think it exists.

18 The other contention that we make -- and I appreciate
19 all the time the court has given me to make the argument -- is
20 that the MDOR securities themselves were not registered, and
21 that Gibraltar's involvement in that, in basically arranging
22 for sale of these MDOR securities, should be punishable under
23 Section 5(a) or Section 5(c).

24 And I guess we argue a couple of things, and I will be
25 brief about this. One is that Gibraltar itself was not a

D8D7SECC

1 substantial participant in this transaction at all. And it's
2 related to the second point that --

3 THE COURT: Well, it depends on what your definition
4 of substantial participant is. They were the ones who bought
5 the shares, and they were the ones who transferred the shares.

6 MR. DEFEIS: They held the shares.

7 THE COURT: Who is a more substantial participant than
8 the buyer or seller?

9 MR. DEFEIS: Well, it could have been anyone else in
10 the world. It could have been another international broker
11 dealer.

12 THE COURT: Right. And if another international
13 broker dealer had done that for the purpose of avoiding U.S.
14 laws, then why are they a less significant player?

15 MR. DEFEIS: That's a critical clause, for the
16 purposes of evading U.S. laws, but the safe harbor here is that
17 it was just providing ordinary broker dealer services.

18 THE COURT: But that's a question of intent. That's
19 not a question of the extent of their involvement or whether
20 they are a critical player. They are clearly a critical
21 player. If you have nobody buying and selling the shares for
22 the company that you are trying to hide, then it's not going to
23 happen. So, you need to find somebody who is willing to go
24 along with your plan to make sure that people don't know that
25 you are just buying and selling it to yourself by being the

D8D7SECC

1 front person who pretends like they're really the independent
2 buyer and seller. Why is that not the most critical part?

3 MR. DEFEIS: I don't know that they pretended they are
4 really the buyer.

5 THE COURT: Isn't that what they allege? They
6 structured a transaction to make it look like this was not a
7 transaction in which the company was transferring the shares --
8 I guess I don't want to say -- to itself. But maybe that's
9 what I should say.

10 MR. DEFEIS: What they say is we don't meet the broker
11 dealer exception because effectively we were an underwriter.
12 That is, that the MDOR proceeds were going back to MDOR.

13 THE COURT: Right. Because you contend that you were
14 the beneficial owner of these shares, and you knew you weren't,
15 and you knew that MDOR was, and you faked it. Why isn't that a
16 claim?

17 MR. DEFEIS: First of all, I think there has been no
18 allegation that they deceived the actual transfer agents
19 involved. I think that the allegation -- particularly as
20 exemplified by the case that was pled out in Florida -- was
21 that everybody was deceived.

22 THE COURT: Everybody but MDOR and you.

23 MR. DEFEIS: And the flat nominees, as they're called,
24 who engaged in the fraud. But as they alleged down in Florida,
25 they indicated that they had false promissory notes that

D8D7SECC

1 indicated that these proceeds were going to MDOR to repay a
2 note. And they deceived a law firm involved, which we alleged,
3 taking shares without a restrictive legend and payment.

4 Again, what we contend is that --

5 THE COURT: -- you were deceived too. But why is that
6 a pleading problem? Because, you know, as they say --

7 MR. DEFEIS: These were ordinary broker dealer
8 services, what we're saying is -- because they don't allege
9 that --

10 THE COURT: But they don't claim that you were
11 deceived.

12 MR. DEFEIS: They don't claim that we were deceived.

13 THE COURT: They claimed that you were in the know.

14 MR. DEFEIS: Well, they put two and two together and
15 claimed that we know. They don't really say that there was a
16 conversation and we were in on the deal.

17 THE COURT: Well.

18 MR. DEFEIS: What they say is -- and they don't
19 contend that we received anything other than ordinary broker
20 dealer commissions.

21 THE COURT: But they are saying of all of the people
22 involved in this transaction, you knew or should have known,
23 there is no way you can argue that you didn't know that these
24 were your shares.

25 MR. DEFEIS: Except if you look at the complaint down

D8D7SECC

1 in Florida, right.

2 THE COURT: I mean they didn't belong to you, and you
3 represented that they belonged to you.

4 MR. DEFEIS: But it goes over with the proceeds, for
5 the benefit of a particular customer.

6 THE COURT: Right. And they say you hid that.

7 MR. DEFEIS: I don't know if they said that we did.

8 THE COURT: Well, I mean for the benefit of the same
9 customer that was selling the shares, if I have it right.

10 MR. DEFEIS: Right.

11 THE COURT: Well, it can't be for the benefit of the
12 same -- if you are transferring it right back to the same
13 customer and just taking a commission, that's not a legitimate
14 transaction. You would agree with that, right? That if I
15 played the role, if I say I want to buy -- if I say I want to
16 buy a hundred shares of IBM, and I get the hundred shares, and
17 they want to know, well, whose shares are these, and I say
18 they're mine and they're for me, but what I really do is then I
19 take the shares and I sell it back to the person who sold it to
20 me, and then I take a 10 percent commission, what else am I but
21 a broker dealer? I'm not the buyer or the seller. I'm not the
22 beneficial owner. I have no interest in this transaction in
23 owning shares.

24 MR. DEFEIS: Right.

25 THE COURT: I only have an interest in facilitating

D8D7SECC

1 the transaction and getting a fee for that. Isn't that the
2 classic definition of broker dealer?

3 MR. DEFEIS: Facilitating a transaction and getting a
4 fee for it is the classic --

5 THE COURT: And isn't that exactly what they allege on
6 this particular instance?

7 MR. DEFEIS: No. They alleged that we were
8 effectively an underwriter because we knowingly were seeing to
9 it that the proceeds went back to MDOR.

10 THE COURT: Right.

11 MR. DEFEIS: But that's different. They try to take
12 us out of that exception. What we're saying is --

13 THE COURT: Why is that not a sufficient allegation?
14 I'm not questioning whether it's true. Why isn't that a
15 sufficient allegation for this liability?

16 MR. DEFEIS: Because it's contradicted by another
17 pleading that the SEC filed.

18 THE COURT: Well, that may make the facts incorrect,
19 but it doesn't make the independent allegation insufficient,
20 does it? I mean if you were going to say that they can't prove
21 it because there is evidence that they admitted that it's not
22 the case, or in a different circumstance --

23 MR. DEFEIS: Well, frankly I think they should rely on
24 consistent theories. That's basically it. I think maybe it's
25 a question of harmonizing what they filed before your Honor

D8D7SECC

1 with what they filed before another federal --

2 THE COURT: How do I resolve that on a motion to
3 dismiss though? Suppose the facts are the way they allege it
4 in front of me rather than the way they alleged it in Florida?

5 MR. DEFEIS: Conceivably it's difficult to resolve on
6 a motion to dismiss, other than to say, hey, why don't you
7 replead this allegation so we understand exactly what you are
8 contending here. I mean, how were they not operating as an
9 ordinary broker dealer? I mean why is it if they deceive a
10 large law firm involved in D.C., and as you claim yourself on
11 paragraph 21 that even the share certificates, although they're
12 titled in Gibraltar's name, they generally include the legend
13 for the benefit of the particular customer.

14 THE COURT: But I don't think there was anything in
15 the Florida case that directly made inconsistent allegations
16 with regard to your client.

17 MR. DEFEIS: No, we were not involved in the Florida
18 case.

19 THE COURT: Right. So, you weren't involved in it.
20 So, how is it -- you are saying it's inconsistent with the
21 allegations they are making here, because in Florida they said
22 all of those people in Florida were deceived --

23 MR. DEFEIS: Correct.

24 THE COURT: -- and so, therefore, that should mean
25 that you were deceived too.

D8D7SECC

1 MR. DEFEIS: Correct. I would say we were included
2 within, you know --

3 THE COURT: But they didn't include you.

4 MR. DEFEIS: They used general language there.

5 THE COURT: No, they said those other people were
6 deceived, and they explain how they were deceived. And you
7 want to say that it makes it insufficient pleading for them to
8 say everybody else was deceived except you, and you knew
9 exactly what was going on.

10 MR. DEFEIS: Yes, and we're saying it would be
11 impossible for us to know if promissory notes were false and
12 that restrictive legends were inappropriately removed from the
13 certificates.

14 THE COURT: OK. And how do I resolve that short of a
15 factual dispute?

16 MR. DEFEIS: I think you ask the SEC to replead it,
17 you know, to consider whether they should be harmonized with a
18 pleading they filed in another federal court.

19 THE COURT: Well, what is it you say that they haven't
20 alleged against your client?

21 MR. DEFEIS: I guess what I say is that they haven't
22 alleged anything to take us out of the broker dealer exception.

23 THE COURT: But they have. They gave you the
24 elements. They said that you knew, and you were involved in a
25 transaction, and you were involved in a transaction that

D8D7SECC

1 defines you as an underwriter because you played simply a role
2 of issuing those shares -- I may not be characterizing it
3 accurately -- but issuing those shares rather than simply
4 acting as a broker dealer who should be protected by that
5 exemption.

6 MR. DEFEIS: I guess what I'm saying is we are relying
7 on the allegations made in another federal proceeding.

8 THE COURT: Right. And what are the allegations made
9 in another federal proceeding that would make it inconsistent
10 with the allegations that they made against you?

11 MR. DEFEIS: That Gibraltar knew that there was some
12 problem with engaging in transactions with these particular --

13 THE COURT: What's inconsistent with what Gibraltar
14 knew that was in the Florida case?

15 MR. DEFEIS: Well, in the Florida case they say that
16 the flat nominees who were involved in the MDOR transaction
17 deceived the transfer agent into issuing MDOR share
18 certificates without the required restrictive legend, so that
19 they wouldn't have known that these particular shares -- which
20 are allegedly and apparently were not properly registered --
21 were in fact problematic and shouldn't have been registered.

22 THE COURT: Are you saying that because they wouldn't
23 have known, you couldn't have known? It's impossible that you
24 couldn't have known?

25 MR. DEFEIS: It's possible. No, I'm not saying it's

D8D7SECC

1 inconsistent. We're not saying that one necessarily excludes
2 the other. What I am saying is that, you know, you have --
3 again I apologize for repeating myself -- but you have another
4 federal proceeding where the same agency is alleging there was
5 an elaborate con and deception involved. And I am also
6 alleging that they don't contend that Gibraltar itself received
7 anything more than ordinary commissions on these transactions.

8 THE COURT: All right.

9 MR. DEFEIS: Thank you, your Honor.

10 THE COURT: Sure. Let me hear from the SEC.

11 MR. KIDNEY: I think based on your questions I'm sure
12 you are going to have questions for me too, but I think you hit
13 on a lot of the reasons why this is not an appropriate case to
14 entertain this motion to grant this motion to dismiss.

15 Mr. DeFeis made a number -- as they have done
16 throughout this motion practice -- made a number of assertions
17 which are not in evidence, and I think it's important that we
18 revisit what the standards are on a motion to dismiss.

19 As we cited in our brief by reference to the Federal
20 Practice Digest -- which has dozens if not hundreds of
21 citations -- the standard wisdom on a motion to dismiss, the
22 SEC is entitled that fair inferences be drawn from its
23 complaint, and it is not an occasion on a motion to dismiss to
24 receive allegations which would require additional evidence.

25 THE COURT: So, let's just go -- I mean we don't have

D8D7SECC

1 to go through the basic standard. I'm fully familiar with
2 that. Let's just go straight to the factual allegations. And
3 let me first ask you -- I have put aside some things.

4 You don't allege that Gibraltar did anything to
5 convince investors to go to the website. That's not your
6 contention.

7 MR. KIDNEY: That is not. But it's only because while
8 we received some voluntary production in the Magnum DOR --
9 which is the MDOR case from Gibraltar, which of course is in
10 the Bahamas, as to which we can't exercise any regulatory
11 authority for investigators to be down there -- we got only
12 voluntary production in that case, very limited. Mr. DeFeis
13 says there were no phone calls, no mailings, no spam, no
14 presence in the United States. That is a subject that is a
15 matter that's subject to proof.

16 THE COURT: Well, it's not a matter subject to proof
17 unless it's a factual dispute that's relevant to your
18 allegations. You don't allege that that's the basis of your
19 claim.

20 MR. KIDNEY: No.

21 THE COURT: So --

22 MR. KIDNEY: The basis of our claim is -- to step back
23 for a minute, obviously a website is a solicitation, it's an
24 advertisement. Amazon.com, which some of us may have heard of,
25 didn't send out postcard, didn't get well known by sending out

D8D7SECC

1 postcards saying go to Amazon.com. It didn't get rich by
2 calling people up and say go to our website Amazon.com. People
3 were originally looking for books, and they wanted to get them
4 cheaper, they went on the website and Amazon.com said come and
5 buy your books here because we can do it cheaper and we will
6 mail it to you real fast.

7 THE COURT: So, have I accurately characterized your
8 set of allegations by saying that you are not alleging that the
9 violation is convincing them to go to the website? You are
10 alleging that the violation is that the website itself is a
11 solicitation by Gibraltar.

12 MR. KIDNEY: Correct.

13 THE COURT: So, once I get to the website, you're
14 saying on the website the website itself solicits U.S.
15 investors to invest.

16 MR. KIDNEY: Well, it says, for example --

17 THE COURT: Is that a yes?

18 MR. KIDNEY: Yes, sir.

19 THE COURT: OK, go ahead.

20 MR. KIDNEY: And it does so by claiming to offer
21 offshore brokerage services. Offshore. From where? I mean if
22 you were just soliciting people in the Bahamas, it wouldn't be
23 offshore. I mean obviously the main offshore is the Bahamas,
24 and it says that it has commissions comparable to those on the
25 "mainland".

D8D7SECC

1 Now, today Mr. DeFeis says, well, you can't
2 distinguish between U.S. and Canada. In their initial moving
3 memorandum they said well, it probably only meant Canada
4 because both the Bahamas and Canada are part of the British
5 Commonwealth. Which is not a fair inference. The inference --
6 which at this point is all the court is asked to draw -- is
7 when they say mainland, and say our commissions are lower or
8 are comparable to those in the mainland, the mainland we are
9 talking about is North America, which includes the United
10 States and Canada.

11 THE COURT: So, you are not contending that mainland
12 is supposed to be a definition, solely a reference to the
13 United States.

14 MR. KIDNEY: No. In fact we put in the website
15 statistics, which are subject to further development of
16 evidence. And if they're admitted, they have to have a
17 sufficient foundation and so forth. But it's a fair inference
18 that at least these website counter things found that whenever
19 they did it -- and of course the number is probably the same
20 because the website has been down; it hasn't been operating for
21 months and months, so whatever number it is, there is no reason
22 to change it because the website hasn't been operating. But if
23 it's necessary, subject to going to those people, and
24 establishing their methodology and so forth, but it's an
25 inference drawn from what is available on the website as to

D8D7SECC

1 where the audience for Gibraltar was coming from, and it was
2 U.S. and Canadian.

3 THE COURT: But I'm not sure what that proves. I'm
4 not sure what that proves. If you say -- that's why I'm trying
5 to figure out whether or not I can clearly draw a line between
6 whether or not you are arguing about solicitation to the
7 website or you are arguing about what has convinced them to
8 invest.

9 If the only real issue is whether or not they are
10 being solicited by the website -- and when I say solicited,
11 that means that the website itself has content that is trying
12 to convince them, to convince U.S. investors to invest -- how
13 is -- I don't understand how those statistics advance that
14 argument one way or the other, unless you have some statistics
15 telling me somebody invested.

16 MR. KIDNEY: Well, somebody did invest. As we said in
17 the complaint also, there were millions of dollars, that
18 Gibraltar used U.S. brokers, and in the MDOR case alone they
19 made 600 sales transactions.

20 THE COURT: But you don't claim that that is a
21 violation of any U.S. laws, to simply have U.S. investors. The
22 question is how they got those U.S. investors.

23 MR. KIDNEY: Are they solicited.

24 THE COURT: OK. So, in what way have you alleged that
25 they -- I assume that you are not -- and maybe you are -- you

D8D7SECC

1 are not saying that this complaint alleges that there were
2 certain investors who were solicited and in fact invested as a
3 result of that solicitation.

4 MR. KIDNEY: Actually we're asking the court to take
5 those allegations about the website, the offering to hide the
6 profits so you don't have to disclose it in a divorce
7 settlement or other thing -- and in fact we say in the
8 complaint they lied to broker dealers about who actually they
9 were investing for, they said it was only for themselves,
10 Gibraltar in the Bahamas, so there wouldn't be any tax
11 consequences.

12 THE COURT: Yeah, but that's true of everybody, right?
13 That's --

14 MR. KIDNEY: Right. But it is more evidence that they
15 in fact were putting their muscle where their word was, what
16 they put on their website to say we will do this for. And we
17 are saying, yes, American consumers, investors did come and
18 become customers due to this website.

19 THE COURT: All right. Let me ask you this then. Is
20 it your position -- I assume it's not, but it may be -- is it
21 your position that even if you can't prove that any of the
22 people that you say were solicited, even if you can't prove
23 that any of them invested, that you still can make out this
24 claim?

25 MR. KIDNEY: We think we can make out the claim by

D8D7SECC

1 showing that they had a lot of U.S. customers and that they had
2 this website that attracted them.

3 THE COURT: But that's not my question.

4 MR. KIDNEY: We think it's a fair inference for the
5 court to draw.

6 THE COURT: No, I understand that part of it. I'm
7 just trying to figure out the extent or the limits of your
8 allegation. You're not saying that you can prove this claim
9 simply by proving they solicited U.S. customers who never
10 invested?

11 MR. KIDNEY: Well, it's the SEC's position that when
12 U.S. customers go on that website, and go into the website,
13 that they are in effect successfully solicited by the website
14 whether they become customers or not.

15 THE COURT: That's what I'm asking.

16 So you're saying if you showed that ten people came to
17 the website but they never invested, in what way do these
18 factual allegations -- with regard to people who didn't
19 invest -- in what ways are these factual allegations sufficient
20 to make out solicitation?

21 MR. KIDNEY: Because the term is solicitation. They
22 intentionally -- well, they don't even have to have intent.
23 But they don't take any effort -- in this case they clearly did
24 make efforts to attract "mainland investors". And they were
25 successful at that, and they had this website.

D8D7SECC

1 At this stage of the proceeding it is not a fair
2 inference to suggest that Gibraltar maintained this website for
3 four years and it didn't result in any business, which is what
4 in effect the defense is asking this court to infer at this
5 stage.

6 THE COURT: So, at this point I would have to conclude
7 that the fact that they have the website, the fact that the
8 website advertises that they're offshore, and they are not on
9 the mainland, and that you can avoid taxes by investing with
10 them.

11 MR. KIDNEY: Well, they offer comparable-to-mainland
12 commissions.

13 THE COURT: OK, comparable-to-mainland commissions.
14 It's reasonable to assume that all of those are references to
15 the United States?

16 MR. KIDNEY: As well as to Canada.

17 THE COURT: All right. So, your argument is not that
18 any of this language is exclusively targeted or defined as the
19 United States. Your argument is it is at least the United
20 States and Canada, and that that's good enough, as long as it
21 includes the United States.

22 MR. KIDNEY: Correct. And that answers Mr. DeFeis'
23 argument in response to your question, that -- basically his
24 position would be if it's in English, and it's an English
25 website in, I don't know, Jakarta, the SEC's position would be

D8D7SECC

1 that if it's just in English and it doesn't specifically say we
2 are not soliciting U.S. investors, well, then, the SEC can go
3 after them.

4 Well, that's not true, because in this instance this
5 website has indicia clearly indicating that it's seeking
6 customers on the mainland. And the reason why that website
7 number, the 2570 or whatever it is -- which shows more Canadian
8 hits than U.S. hits -- is significant -- and we will have to
9 prove it up, whatever the number is -- is because actual U.S.
10 citizens or U.S. ISPs, in any event, were going to that
11 website. Some of them may have become customers, maybe none of
12 them did, but they were solicited. They went to that website.

13 THE COURT: And in what way once they got to the
14 website, what way were they targeted and in what way did they
15 attempt to convince them to invest as U.S. investors?

16 MR. KIDNEY: Well, because they said we can keep it
17 secret.

18 THE COURT: Well, that's true in China, they keep it
19 secret.

20 MR. KIDNEY: Well, I don't know. We know for a fact
21 they did it in the United States by filling out falsely IRS
22 forms for the broker dealers so that they wouldn't withhold
23 taxes from those accounts.

24 THE COURT: But if that's true, that would be true
25 even as to clients they didn't solicit.

D8D7SECC

1 MR. KIDNEY: It doesn't matter.

2 THE COURT: That's what I'm saying, it doesn't matter.

3 What difference does it make? It doesn't advance the
4 solicitation argument.

5 MR. KIDNEY: Sure it does, because you asked me
6 basically what would cause a U.S. investor -- who is going to
7 pay mainland commissions to this offshore broker dealer -- to
8 invest.

9 THE COURT: No, but that's not the question I should
10 have asked. The question is not what would have caused them.
11 The question is whether were they caused to do that because the
12 company, Gibraltar, was attempting to convince them to do that
13 even though they knew that they didn't have the legal right to
14 do so?

15 MR. KIDNEY: Well, sure, website. The website was an
16 ad, a solicitation, and it identified reasons why U.S.
17 customers, Canadian customers should invest in -- should buy
18 and sell their securities through Gibraltar.

19 THE COURT: But what's critical to your argument is
20 the inference that even though it doesn't mention U.S. at all,
21 that the references are meant to be veiled references to U.S.
22 investors, and it's intended to convince U.S. investors to
23 invest offshore with them?

24 MR. KIDNEY: Correct.

25 THE COURT: All right.

D8D7SECC

1 MR. KIDNEY: And it succeeded. Because we know they
2 had many, many U.S. investors. I don't quite understand how
3 they could get all those investors and run a website. And
4 discovery presumably will show that Gibraltar itself maintained
5 sufficient records to show that its website was successful for
6 four years. Otherwise why would they maintain it?

7 THE COURT: We don't know.

8 MR. KIDNEY: And we don't know. We should find out in
9 discovery. At this stage of the game on a motion to dismiss,
10 the SEC need only establish sufficient facts along with
11 inferences -- and we pled both facts and asked the court to
12 draw inferences -- so more than sufficient to show that what is
13 an elephant is in fact an elephant.

14 THE COURT: Yeah, but your argument isn't that if the
15 statistics show that 75 percent of the customers were Canadian
16 and 25 percent of the customers were U.S., that that somehow
17 inherently proves that that 25 percent of U.S. customers were
18 solicited by the website.

19 MR. KIDNEY: Well, they went to the website, and
20 because of what the content of the website says, yes, they were
21 solicited.

22 THE COURT: Yeah, but you don't allege that you know
23 somebody who went to the website and therefore invested after
24 they went to the website because of the website. You don't
25 make that allegation.

D8D7SECC

1 MR. KIDNEY: No, we don't say that, because basically
2 all of these witnesses, the investors that Mr. DeFeis talked
3 about, are supposed investors that were part of this Magnum DOR
4 scheme. So, they weren't going to say that -- I mean they went
5 there because Magnum DOR was willing to help them return the
6 money to Magnum DOR.

7 THE COURT: Well, wouldn't you agree that logic would
8 at least dictate that if your claim is that all of these
9 people -- and whatever the raw numbers are -- all of these
10 people came to invest as a result of being solicited by their
11 website, it wouldn't be unreasonable to say that one would
12 expect that you would have such evidence? You would have
13 identified at least one investor who you claim was such an
14 investor.

15 MR. KIDNEY: Why would any investor like that want to
16 bring themselves to the attention of the Securities and
17 Exchange Commission when they probably are also avoiding taxes
18 for the IRS?

19 THE COURT: Then how are you going to prove that any
20 of these people -- how are you going to prove that any investor
21 they have was solicited by the website?

22 MR. KIDNEY: Well, first of all, we have the website.
23 We don't have to prove that people actually invested.

24 THE COURT: So, you don't intend that that would be
25 required with regard to your proof.

D8D7SECC

1 MR. KIDNEY: No. If they visited the website, they
2 were solicited.

3 THE COURT: So, you say it's sufficient to allege and
4 prove that people came to website, they saw that it was
5 offshore and there was mainland to avoid taxes, and there is
6 some U.S. investors that we can't say are the same investors,
7 but they have U.S. investors, that that in and of itself is
8 sufficient allegations and proof to prove your case?

9 MR. KIDNEY: Well, we have asked -- at some point I
10 assume we might get to the litigation planning -- but we have
11 asked the defense to provide us with all evidence of any
12 contacts with the United States, which would include the very
13 things that Mr. DeFeis says they didn't do. But I would be
14 very surprised if there were no phone calls to the United
15 States. I would be very surprised if there was no e-mail
16 communication to the United States. After all, it dealt with
17 all these brokers from the United States.

18 THE COURT: The only relevance of that would be such
19 communications with people who are not customers.

20 MR. KIDNEY: Well, to the brokers maybe. No, that
21 would include --

22 THE COURT: What difference does it make? If it's
23 already to customers, it doesn't prove how they got those
24 customers. The critical issue here is not a debate about
25 whether they have U.S. customers. We know they have U.S.

D8D7SECC

1 customers, and your position is they are entitled to have U.S.
2 customers, and they would be entitled to have as many U.S.
3 customers as want to come to them.

4 MR. KIDNEY: And that they don't solicit.

5 THE COURT: Right. That's not the issue. The issue
6 is where is there the evidence that the customers they get are
7 being solicited, or some other customers that they're not
8 getting are being solicited?

9 MR. KIDNEY: The website.

10 THE COURT: Well, I mean let's put it this way. I
11 understand your position, and you may convince me for purposes
12 of a motion to dismiss -- and I haven't decided yet -- that
13 that's minimally sufficient. But quite frankly it is clearly
14 minimally sufficient. It is not significant proof of
15 solicitation to simply say, well, you have to infer that
16 mainland means that they are talking to U.S. citizens, and you
17 have to infer that offshore means that they want U.S. people to
18 invest, and you've got to infer that because they say you can
19 avoid taxes that they are talking about avoiding U.S. taxes.

20 I mean this isn't the strongest set of allegations
21 that one could make with regard to a solicitation claim. This
22 is one of the weaker set of allegations that one can make with
23 regards to a solicitation claim because you have no direct
24 evidence of identifying U.S., or articulating that this is for
25 U.S. investors in that direct sense, and you have no allegation

D8D7SECC

1 that you have a person, a company that says, yes, I am a
2 customer, and I am a customer because I was solicited by the
3 company.

4 So, I mean, you know, your inferences are -- as I say,
5 I won't characterize them as weak, but I will characterize them
6 at best minimal as opposed to a maximum set of allegations that
7 one could make.

8 I know what you would characterize as a stronger case,
9 but I don't know what you would characterize as a much weaker
10 case than just simply saying, ah, they solicited because they
11 said mainland, you know what that is a buzzword for. That's
12 the way your argument is based.

13 MR. KIDNEY: Well, actually to the contrary, your
14 Honor. I feel strongly that this is a strong case. We have a
15 website that was in existence for four years. We have some
16 statistical information that says U.S. customers did go to that
17 website. We have a website which presumably was maintained
18 because Mr. Davis and Gibraltar were actually getting results
19 from it. We have many, many, many --

20 THE COURT: What do you mean getting results from?

21 MR. KIDNEY: Getting people to sign up, to invest with
22 them.

23 THE COURT: Well, where is that? You don't allege
24 that.

25 MR. KIDNEY: Well, we haven't taken any discovery from

D8D7SECC

1 them because they are down in the Bahamas.

2 THE COURT: I am not talking about discovery. You
3 just said you have a stronger case, and you say you have a
4 stronger case because of this fact. But I'm saying to you not
5 on your complaint, because that's not what you allege in your
6 complaint.

7 MR. KIDNEY: Actually, the complaint alleges that
8 they -- we have alleged language that the only logical
9 inference is that it was directed to Canadian and U.S.
10 customers.

11 THE COURT: Tell me where in your complaint. Show me
12 where in your complaint you allege that customers of Gibraltar
13 are customers because they were solicited.

14 MR. KIDNEY: We allege they were solicited.

15 THE COURT: No. You see again you are avoiding my
16 question. That's not my question. You made a different
17 statement just a minute ago, and I am just saying that that's
18 not what you have in your complaint.

19 You don't have in your complaint that any current
20 customers of Gibraltar or any customer that Gibraltar got was
21 solicited by Gibraltar. That's not what you allege.

22 MR. KIDNEY: That's not even an element of the
23 offense.

24 THE COURT: I didn't ask you that. You would agree
25 with me that's not what you allege.

D8D7SECC

1 MR. KIDNEY: We have not put that in.

2 THE COURT: So, based on that argument -- that's not
3 part of the argument on why this complaint is sufficient,
4 because you have alleged that they have customers who were
5 solicited. That's not what you allege. Your case would be
6 stronger if you had alleged that. As I say, that's a stronger
7 case rather than a weaker case. I'm not saying that it is an
8 insufficient case, but obviously a stronger case would be if
9 the website said something specifically about U.S. citizens
10 investing with the company rather than just buzzwords. And
11 obviously it would be stronger if you can allege that there are
12 certain individuals who were customers and they are customers
13 because they were solicited by them. I am not saying that it's
14 necessary, but that would be a stronger case rather than a
15 weaker case than what you have alleged.

16 MR. KIDNEY: Well, given that the SEC is a regulator
17 and does not represent individual investors, given that the
18 investors that it has communicated with were by and large to
19 one degree or another involved in a Section 5 violation, the
20 sale of unregistered securities, and given that Gibraltar is a
21 Bahamian company which is not subject to investigative
22 subpoenas down there, it is not surprising that we can't allege
23 with great specificity that there were specific customers who
24 actually became customers because of the website. But that is
25 not an element of the offense. I agree that if we had such

D8D7SECC

1 people, we would be in better shape, we would have a stronger
2 case, but I think that right now there is no doubt that we have
3 a sufficiently strong case to withstand a motion to dismiss,
4 which is largely based on matters not alleged and as to which
5 there is no evidence, which Mr. DeFeis makes. At one point he
6 even argued mainland could mean Great Britain, again bringing
7 up the Commonwealth argument, even though Great Britain is not
8 a mainland. It's called the British Isles for a reason. And
9 these inferences that they ask the court to draw are just
10 crazy.

11 THE COURT: So, what am I supposed to assume is going
12 to be the underlying proof of the way that you have alleged
13 these claims?

14 As I say, the way you have alleged it, I don't have
15 any reason to believe that we'll have a whole lot more at the
16 end of this case than we have at the beginning of the case.
17 The only question is, it seems to me, whether it is reasonable
18 to -- if you are not going to show that there is -- if you
19 don't think that you are going to find direct evidence that
20 certain customers were solicited by the website or in any other
21 way, then the facts as you've given to me aren't going to
22 change. The question is whether or not the content of the
23 website can reasonably be interpreted as being legally a
24 solicitation.

25 MR. KIDNEY: Correct.

D8D7SECC

1 THE COURT: That doesn't depend on any new evidence or
2 any discovery. Either I have to agree with you that that in
3 and of itself is sufficient to be a solicitation, or it's not
4 sufficient to be a solicitation.

5 So, I would have to determine where it is alleging and
6 proven offshore, mainland, taxes, that that combination of
7 things. If a reasonable trier of fact, by understanding that
8 that's the nature of the language being used by the website,
9 whether that would constitute in and of itself, legally without
10 any further proof -- because you are not alleging any further
11 proof -- whether that in and of itself would legally constitute
12 a solicitation. Isn't that really a legal issue and not a
13 factual issue?

14 MR. KIDNEY: Well, that's partly a legal issue, but I
15 think also you have to take into account that all of the
16 business is North American mainland business.

17 THE COURT: You can't do it that way, because 75
18 percent of their business is Canadian. So, the only statement
19 you can make is 25 percent of their business is U.S., and we
20 have no idea how they got that business.

21 MR. KIDNEY: Well, we probably will after we take some
22 discovery.

23 THE COURT: Well, you may or may not, but you don't
24 allege in this complaint that that's a relevant consideration.
25 That's not part of your allegations.

D8D7SECC

1 MR. KIDNEY: Well, the SEC has put in the complaint
2 that 25 percent of the visitors to this website were from the
3 United States, and we have put in --

4 THE COURT: Well, let me make sure I have this right.
5 I thought the allegation was that 25 percent of their customers
6 were U.S. citizens. It's 25 percent of the people who --

7 MR. KIDNEY: Website hits.

8 THE COURT: Wait a minute. That 25 percent of the
9 website hits are customers?

10 MR. KIDNEY: No, are U.S. citizens. Come from the
11 U.S.

12 THE COURT: Right. But that's not what you just said.
13 So, you are not talking about customers.

14 MR. KIDNEY: I'm talking about website hits.

15 THE COURT: 25 percent of the website hits are --

16 MR. KIDNEY: -- are U.S. people.

17 THE COURT: But that does not advance your argument
18 one way or the other --

19 MR. KIDNEY: Yes, it does.

20 THE COURT: -- with regard to solicitation.

21 MR. KIDNEY: Sure it does.

22 THE COURT: How? Who cares whether or not --

23 MR. KIDNEY: It's not necessary that any of those 25
24 percent have gone the extra step and invested through
25 Gibraltar. What it does show is that there is a website, that

D8D7SECC

1 the language we have cited shows that they are soliciting
2 people as investors in North America, and in 25 percent of
3 their hits they were successful in at least showing their ad to
4 25 percent.

5 THE COURT: Yeah, but you see that's the thing. I
6 think I understand your argument. That's a false argument.
7 That just means that 25 percent of the hits were U.S.
8 customers. That means --

9 MR. KIDNEY: No, U.S. people.

10 THE COURT: U.S. people, not customers. So let's
11 say -- that means that, you know, 1,000 people looked at their
12 website, 1,000 U.S. people looked at their website. What does
13 that prove? What does that prove about solicitation?

14 MR. KIDNEY: That they solicited U.S. customers.

15 THE COURT: How?

16 MR. KIDNEY: By saying we have commissions equal to
17 the mainland, we do all of this other stuff. What other kind
18 of solicitation would your Honor want?

19 THE COURT: Because I'm just saying that that's an
20 irrelevant statistic. It doesn't matter whether or not a
21 thousand people came to the website; it doesn't matter if it
22 was one person that came to the website. The question is
23 whether the website is a solicitation. If I'm looking up
24 Gibraltar as a place, and this comes up as a hit, that doesn't
25 prove one way or the other that I have been solicited. How

D8D7SECC

1 does it prove that I have been solicited by the percentage of
2 people who went to the website? If your argument is it's not
3 how many people go to the website, it's how many people are
4 convinced by the website, are being solicited by the words of
5 the website, if they haven't seen the words ever the website
6 until they got there, what difference does it make that 25
7 percent of the people who got there were U.S. people?

8 MR. KIDNEY: Because --

9 THE COURT: Because you don't tell me how they got
10 there.

11 MR. KIDNEY: Well, they got to the website.

12 THE COURT: Not by being solicited.

13 MR. KIDNEY: And once they got to the website they
14 were solicited.

15 THE COURT: That's true whether it's 25 percent or 90
16 percent.

17 MR. KIDNEY: Yeah, we are showing -- it just says that
18 people in the United States went to the website --

19 THE COURT: Went to the website.

20 MR. KIDNEY: Yeah.

21 THE COURT: That's right. That doesn't prove --

22 MR. KIDNEY: And the language --

23 THE COURT: That doesn't advance --

24 MR. KIDNEY: They weren't told you can't invest here.
25 They weren't told you can't do anything like that.

D8D7SECC

1 THE COURT: I know. But again I just don't see --

2 MR. KIDNEY: In fact, it said we offer commissions to
3 you that are equal to that of the mainland, we will hide your
4 trading, we will do all this stuff. It's an ad.

5 THE COURT: But the problem I have with that argument
6 is that argument stands on its own regardless of what
7 percentage of the people got there. How does the percentage of
8 the people who got there advance that argument? Whether it was
9 5 percent or 95 percent, what difference does it make?

10 MR. KIDNEY: That's true. We just put that in the
11 complaint because that's what the number was.

12 THE COURT: I understand that, but I'm saying to you
13 you are trying to argue that that somehow advances the argument
14 that they are being solicited. I'm saying I don't understand
15 that part of the argument, because telling me what percentage
16 went to the website that were U.S. citizens doesn't tell me
17 whether or not they are solicited. If they went to the website
18 and the website is not a solicitation, then they weren't
19 solicited. If they went to the website and the website is a
20 solicitation, they were solicited. And that's irrelevant as to
21 what number went to the website.

22 MR. KIDNEY: Well, I don't think it is irrelevant,
23 because one way you consider an ad is where you place the ad
24 and who your audience is likely to be.

25 THE COURT: Right.

D8D7SECC

1 MR. KIDNEY: And if I wanted to do advertise to the
2 people in Brooklyn or in Manhattan, I would put an ad in a New
3 York newspaper. But it would be very difficult to argue when
4 we're only in the print version, at least, that that was a
5 solicitation of people in San Francisco.

6 THE COURT: I know. But you are not arguing in this
7 case that this website is somehow more accessible to people who
8 are on the Internet in the U.S. than the people who are on the
9 Internet net in Afghanistan. That's not an argument to make.

10 MR. KIDNEY: I have no idea how accessible it is.

11 THE COURT: Right. I could be anywhere in the world
12 and I go on the website and put in Gibraltar, and I'm going to
13 come up with this website.

14 MR. KIDNEY: But the point is you asked about the
15 website, and you seemed to be skeptical that the use of the
16 term mainland and the comparison to mainland commissions and so
17 forth is sufficient evidence.

18 THE COURT: Is not the strongest.

19 MR. KIDNEY: I disagree with that, but other evidence
20 would be --

21 THE COURT: Do you have a case in which that was the
22 only set of allegations and that it was held to be sufficient
23 either on motion to dismiss or on summary judgment?

24 MR. KIDNEY: I think this may be the first case --

25 THE COURT: It will be the first one I heard of too.

D8D7SECC

1 Most of them are stronger than this.

2 MR. KIDNEY: But the fact the ad drew flies shows that
3 it was intended to be what it said. So, it's just more
4 evidence in support. You say it's a weak inference, I don't
5 think it is a weak inference. It would be a stronger inference
6 if it said U.S. investors come to this website.

7 THE COURT: That's right.

8 MR. KIDNEY: Yeah, but --

9 THE COURT: But let's put it this way. It is a weaker
10 set of allegations than any other case that I am aware of that
11 gives me a factual scenario in which the SEC says, look, they
12 are solicited; it's obvious they are solicited.

13 I mean, every other case I have seen is a stronger set
14 of allegations than this.

15 MR. KIDNEY: Well, you probably end up mostly with
16 fraud cases, because those are the ones that tend to litigate.

17 THE COURT: Probably.

18 MR. DEFEIS: So, on a fraud case you are really saying
19 you're lying, and you have a directed audience from whom you
20 are trying to steal money.

21 THE COURT: That may be true. And, as I say, that's
22 not the determinative factor here whether or not you've got the
23 strongest set of allegations or the weakest set of allegations.
24 But obviously if I have to put this on one spectrum or the
25 other, I put it on the weaker set of allegations that I've been

D8D7SECC

1 aware of in terms of cases that I've seen rather than the
2 stronger set of allegations that I am aware of.

3 MR. KIDNEY: Well, the way we pled it we don't need to
4 prove scienter. And we're not suggesting that Gibraltar didn't
5 do exactly what it said it was going to do, which was hide your
6 income from taxes and do all those things. So, we are not
7 alleging fraud. The fact is they may defraud the IRS, but they
8 didn't defraud their investors. So, the website itself was
9 accurate, or at least we're not claiming it wasn't accurate.

10 Now, on the Section 5 claim -- if I can spend a minute
11 on that -- basically the complaint says -- first of all, this
12 business about promissory notes, we don't even allege that
13 Gibraltar got involved in the promissory notes. We suspect
14 these promissory notes created by the flat nominees were
15 created after the SEC investigation. Had they in fact seen the
16 promissory notes, the case would be even stronger against
17 Gibraltar because then they'd see -- which they should have
18 known anyway because it was S8 stock, which goes to consultants
19 and so forth, and mostly for start-up companies who don't have
20 the cash, so they give stock to their outside consultants and
21 so forth-- which the consultants then are supposed to be able
22 to sell so that they can be compensated, and Gibraltar knew
23 this was S8 stock supposedly that these nominees sent to it, it
24 changed it, put it in its own name, the broker dealer, and then
25 sent most of the proceeds back to Magnum DOR.

D8D7SECC

1 So, they knew or should have known -- and we are not
2 even alleging scienter here -- that it was actually to raise
3 capital for Magnum DOR rather than to compensate outside
4 vendors.

5 But in any event, as your Honor said -- and as the
6 government said, and there was the case in the sentencing we
7 all heard just this morning -- just as that doctor was
8 important to that scheme because he could sign the scripts and
9 so forth, and they could have got other doctors -- apparently
10 from what I heard they did get another doctor -- the fact that
11 you can get other people to do your work for you doesn't make
12 you not an important party for conducting the Section 5
13 violation that we allege here that they participated in. And
14 they were totally instrumental in that; they were not a minor
15 party. So, the Section 5 certainly should withstand any motion
16 to dismiss.

17 The control person liability, I don't think the
18 defendants went to administrative proceedings. I have not
19 looked to see whether there are control person cases that are
20 not also fraud cases, but I suspect if you went -- I am
21 familiar from just my 25 years at the SEC that that happens.
22 If your Honor want more authority on that, we are glad to give
23 it to you. But certainly culpable means responsible. And
24 Mr. Davis is the only person at Gibraltar, as far as we are
25 concerned -- I mean he had people working for him but he was in

D8D7SECC

1 charge.

2 Finally, I know the other side has asked to
3 consolidate this case. There are no common factual issues with
4 the other case. Our case has no scienter claims.

5 THE COURT: Are you representing the SEC in both
6 cases?

7 MR. KIDNEY: No, I'm not.

8 THE COURT: All right. I can tell you what my view is
9 on this, and you can convince me otherwise. But my view is
10 that I would deny the motion without prejudice to consolidate
11 at this point, but I would probably -- I think I'm going to
12 order that you still coordinate discovery. I don't see any
13 reason why you shouldn't coordinate discovery.

14 And I know that there is a motion that's just recently
15 been made in the other case, and my intention is to adjourn
16 this case to the date when the other case is on and to have the
17 SEC and the defense coordinate discovery so we don't have a
18 waste of resources.

19 Now, if it turns out to be appropriate for some
20 consolidation at trial, that's an issue and I can revisit. But
21 at this point I think consolidation is necessary, and I can put
22 that off once we get further into it, depending on where we are
23 in both of these cases, after the motions are decided.

24 But there is no reason why you shouldn't coordinate
25 the document production. There is no reason why you shouldn't

D8D7SECC

1 coordinate the depositions, to the extent you propose to
2 depose.

3 MR. KIDNEY: The only comment I have on that, you
4 know, I don't have any objection in principle to that. I think
5 though then that our earlier -- we submitted a statement to the
6 court last week saying that we were happy with the court's
7 proposed litigation schedule. We would have to revisit that
8 depending on what the schedule is for the other case, which is
9 bigger and more complicated and has a lot more facts that it
10 needs to develop. So, I would probably have to withdraw that
11 based on whatever your Honor rules.

12 THE COURT: Why don't we do this. I think I have the
13 motion filed, but I don't have a response to the motion in the
14 other case. Hopefully it will be fully submitted, and I will
15 hear them on the motion on that day. I think they are coming
16 here in September.

17 MR. KIDNEY: There is a September date I heard.

18 MR. PATTERSON: I think it's September 10, your Honor.

19 THE COURT: I don't even know if that motion is going
20 to be fully submitted by September 10.

21 MR. KIDNEY: Well, if your Honor would just include us
22 in whatever notice for both cases for the next scheduling
23 conference.

24 THE COURT: As a matter of fact, I'm going to leave
25 the September 10 date on for now, and I'm going to say that you

D8D7SECC

1 guys should be here too, and if we need to deal with some joint
2 issues, we will. I don't know whether or not in that short
3 period of time I can get a decision out to you on this one
4 before then, this being the end of August, and quite frankly
5 I'm going to be transitioning new law clerks in the next couple
6 of weeks too. So, we will see if I can do it by then.

7 Otherwise, I'm going to tell the other parties to be
8 heard on that motion, if it's fully submitted, on the 10th. If
9 not, I will put it off until it's fully submitted, hear you on
10 that, resolve the motions, and then have you coordinate the
11 discovery, and then we can revisit the consolidation for trial,
12 if it's necessary.

13 Mr. DeFeis, did you want to add anything?

14 MR. DEFEIS: Just one additional housekeeping
15 schedule. We would just like to request an opportunity to file
16 our initial disclosures by September 3, because our client is
17 presently traveling on vacation. That's a week before the
18 initial conference in that case.

19 MR. KIDNEY: Well, I guess it probably wouldn't be
20 worth objecting. We are going to start our document production
21 in two weeks.

22 MR. DEFEIS: Thank you, your Honor.

23 THE COURT: As I say, I don't want to have a lot of
24 unnecessary duplicative work. Judge Cedarbaum said to me in
25 another case the government is fungible. So, it's hard enough

D8D7SECC

1 to say when I have the SEC, the CFTC, and the U.S. Attorney's
2 office, and they're all arguing from a different government
3 point of view, but when I have the SEC in one case and the SEC
4 in another case, I would assume that there's is one SEC and
5 that you could --

6 MR. KIDNEY: It's the New York office versus the
7 Washington office. We aren't all that close.

8 THE COURT: That distinction I don't think I'll draw.

9 All right. So, let me get to this as quickly as
10 possible. But I will see you on the 10th unless their motion
11 is not fully submitted. And if we need to adjourn that, I will
12 adjourn that until quickly after that, right after it is fully
13 submitted, so we can move forward. All right?

14 MR. KIDNEY: Thank you, your Honor.

15 MR. DEFEIS: Thank you.